Nos. 19-1382 (L), 19-1387, 19-1425 (Cross-Appeal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

La Unión Del Pueblo Entero, *et al.*,

Plaintiffs-Appellees/Cross Appellants,

v.

Wilbur L. Ross, *et. al.*,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Maryland (8:18-cv-01570-GJH and 8:18-cv-01410-GJH)

PLAINTIFFS-APPELLEES' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Defendants' opposition errs in the same way as the District Court's opinion—failing to evaluate the post-trial findings within the totality of circumstances leading to the addition of the citizenship question. Defendants incorrectly perceive that their salvation lies in the District Court's failure to find direct evidence of Secretary Ross' racial animus. Defendants' arguments ignore or systematically isolate each of the numerous factual findings that, taken together, require the conclusion that unlawful discrimination motivated the decision to add a citizenship question to the 2020 Census.

The most telling of all of the protests contained in Defendants' opposition may be the following: "The circumstances surrounding the Secretary's decision to reinstate a citizenship question thus bear no resemblance to the circumstances present in *North Carolina State Conference of NAACP v. McCrory [("NAACP")]*, 831 F.3d 204 (4th Cir. 2016), the case on which plaintiffs principally rely." Defs.' Br. at 28–29. Plaintiffs do rely on *NAACP*, with very good reason. This Court's recent opinion in that case is instructive to the point of parallelism.

In both cases, the district court entered extensive factual findings, many of which rested on uncontested facts, including findings that demonstrated the defendants' awareness of disproportionate, discriminatory impact. In *NAACP*, those facts included knowledge on the part of legislators that many Black voters

lacked the kind of photo identification the legislation required, as well as an awareness of the racial breakdown in usage of certain voting procedures, all of which were found to be used disproportionately by Black voters and all of which were eliminated by the legislation. 831 F.3d at 216–18. Here, Secretary Ross requested and received from the Census Bureau scientific analysis concluding that the addition of a citizenship question would harm data quality, and would cause a disproportionate decline in response rates among noncitizen and Latino households. JA 2860–71.

The justifications proffered in *NAACP* were found to be "meager." 831 F.3d at 214. Here, the "justification" is even more inculpatory. The proffered Voting Rights Act ("VRA") enforcement justification was found to be pretextual, and the record reflects no other justification. JA 2951–60. The *NAACP* opinion found that the challenged actions were "inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist." 831 F.3d at 214. In this case, the district court found that the VRA rationale was "manufactured" by the Secretary's staff, JA 2952–54, long after the "Secretary [started] pursuing a citizenship question with urgency," JA 2952, 2874–77, and that "DOJ did not need the data it requested[,]" JA 2878–79. In *NAACP*, this Court responded to partisan justifications offered by the North Carolina legislature, by holding that partisan interests cannot justify discriminatory means. 831 F.3d at 225–26, 233. Here, this

Court should approach with similar caution Defendants' contention that seeking to exclude all noncitizens, who are primarily Latino, from redistricting and apportionment is not discriminatory. Defs.' Br. at 45–46.

Finally, this Court observed that the *NAACP* district court applied its factual findings when analyzing whether the legislation had a discriminatory result under Section 2 of the VRA, "but not when analyzing whether it was motivated by discriminatory intent." 831 F.3d at 225. Here, the district court applied its extensive findings of improprieties, of falsehoods, of departures from procedure, of disparate impact, of manufactured rationale, all to find in favor of Plaintiffs on their claims under the APA and the Enumerations Clause, but failed to apply those same findings to conduct an *Arlington Heights* analysis of whether the question was motivated, in whole or in part, by discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* ("*Arlington Heights*"), 429 U.S. 252 (1977).

Defendant's approach, like the approach taken by the district court in *NAACP*, "missed the forest in carefully surveying the many trees." 831 F.3d at 214. The approach also fails to take into account this Circuit's recognition of the purpose and propriety of a "holistic" *Arlington Heights* analysis, "for '[d]iscrimination today is more subtle than the visible methods used in 1965.' H.R. Rep. No. 109–478, at 6 (2006), *as reprinted in* 2006 U.S.C.C.A.N. 618, 620." *Id.* at 221. "[O]utright admissions of impermissible racial motivation are infrequent

and plaintiffs often must rely upon other evidence." *Id.* (*quoting Hunt v. Cromartie*, 526 U.S. 541, 553 (1999)).

Like the extensive findings in *NAACP*, the district court's factual findings here are accurate and well-supported, many uncontested. And, like the facts in *NAACP*, the findings here "are devastating." *Id*. at 227. They reveal administration officials, guided by outside partisan interests, who set in motion a plan that they hope will inexorably lead to the exclusion of Latinos and noncitizens from their constitutionally guaranteed right to equal representation in apportionment and redistricting. Therefore, when the Department of Commerce, which is constitutionally charged with taking an *accurate* Census for purposes of apportionment, is warned that adding a citizenship question will make the count inaccurate, and will further negatively affect noncitizens and Latinos due to disproportionate non-response rates, the plan proceeds without a hiccup—because the predicted inaccuracy is wholly consistent with the motive.

The district court's conclusion on intentional discrimination is inconsistent with the admonition in *NAACP* and *Arlington Heights* against viewing the evidence piecemeal. The district court made extensive findings that were material to each *Arlington Heights* factor, but then failed to engage in the analysis required, and instead incongruously concluded that there was "little, if any evidence,

showing that Secretary Ross harbors animus towards Hispanics[.]" JA 2959. That incongruity constitutes reversible error.[1]

ARGUMENT

I. Disparate Impact is Probative of Discriminatory Intent

Ignoring the district court's findings to the contrary,[2] Defendants argue that the evidence of impact has minimal probative value. The district court, however, concluded that "[o]verwhelming evidence supports the [c]ourt's finding that a

[1] Defendants argue that if the Supreme Court concludes that Defendants complied with the APA, the Supreme Court will "likely reject the materiality" of Plaintiffs' allegations that go to racial animus. Defs.' Br. at 21–22. There is a myriad of possible outcomes from the Supreme Court reviewing the APA claim in the *New York* case. None of those uncertainties are reason to delay determining whether intentional discrimination motivated the addition of the citizenship question, which is not before the Supreme Court. Moreover, judicial deference of the kind accorded to governmental decision-making under the APA is not warranted when this Court reviews whether the record supports a conclusion that Defendants engaged in unconstitutional discrimination. *Id*. This is because a finding that Defendants' justifications are rational "is a far cry from a finding that a particular law would have been enacted without considerations of race." *NAACP*, 831 F.3d at 234 (citing *Arlington Heights*, 429 U.S. at 265–66).

[2] Although the Administrative Record includes evidence sufficient to conclude that Defendants violated the equal protection clause, the Court's review is not limited to the Administrative Record. It was proper for the district court to allow and consider extra-record discovery both because Plaintiffs plausibly alleged a claim of intentional discrimination and were thus separately entitled to discovery, *see Webster v. Doe*, 486 U.S. 592, 604 (1988), and because Plaintiffs made a "'strong showing of 'bad faith' or improper behavior' [by Defendants] in constructing the record and making the agency decision," JA 2940–41 (*citing Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997)).). Plaintiffs' showing ultimately "matured into a factual finding of bad faith and pretext." JA 2941.

citizenship question will cause a differential decline in Census participation among noncitizen and Hispanic households." JA 2886.

In support of the purported rationality and procedural regularity of the decision, Defendants rely primarily on Secretary Ross' announcement memorandum ("Ross Memo"). *See* Defs.' Br. at 6–9, 25. However, the district court found each of the justifications recited in the Ross Memo to be incorrect, unfounded, and deceptive, whether based on the Administrative Record alone, *see* JA 2867–74, JA 2951–54, or extra-record evidence, JA 2874–85.

Defendants incorrectly argue that the evidence in the record cannot reliably predict a disparate impact because the Census Bureau's non-response analysis does not take into account other alleged factors that could account for a differential non-response. Defs.' Br. at 28. To the contrary, the court found that the Census Bureau's study predicting a 5.8 percent decline in self-response did in fact utilize statistical controls, and that the differential decline is not explained by the greater length of the ACS questionnaire or by other potentially sensitive questions on the ACS. JA 2889–90; JA 4139.[3]

[3] On June 21, 2019, Defendant Census Bureau released a paper titled, "Predicting the Effect of Adding a Citizenship Question to the 2020 Census." J. David Brown et al., U.S. Census Bureau, Center for Economic Studies, *Predicting the Effect of Adding a Citizenship Question to the 2020 Census*, (CES 19-18, 2019), https://www2.census.gov/ces/wp/2019/CES-WP-19-18.pdf. The Bureau concluded that "the addition of a citizenship question will have an 8.0 percentage point larger effect on self-response rates in households that may have noncitizens

Furthermore, the district court found, based on quantitative and qualitative evidence in the record, that "because of trust and confidentiality issues—heightened by the macro-environment—questions about citizenship are particularly sensitive for Hispanics and noncitizens, meaning self-response rates among these groups will decline more than any decline in overall participation." JA 2888; *see also* JA 2886–88.

Defendants erroneously cite to the district court's findings for the proposition that non-response follow-up ("NRFU") "would correct most of the decline in initial response rates that plaintiffs' experts estimated." Defs.' Br. at 25–26. This is false—the district court found the opposite. "[L]ower self-response causes higher net undercounts because lower participation results in more enumerations through NRFU, which generates poorer quality data and undercounts," JA 2893, and that a decline in self-response rates "is especially likely to lead to differential undercounts of Hispanics and noncitizens because at every step in the NRFU and imputation process, these remedial efforts will be less effective at mitigating the decline in these groups' participation rates," JA 2895.

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relative to those with only U.S. citizens." *Id.* at 1. As it did previously, the Census Bureau used a regression analysis accounting for variables, including household size, home ownership, income, the presence of children in the home, employment status, and various demographic characteristics (including marital status, sex, race/ethnicity, age, and educational attainment). *Id*. at 11. This new evidence indicates that the addition of a citizenship question will have a substantially greater impact on noncitizen self-response rates than was evident in the record available to the district court at trial.

Relying on *Personnel Adm'r of Mass. v. Feeney*, 442 U.S 256, 279 (1979), Defendants argue that the Secretary simply made a "policy judgment," based on a weighing of evidence and need for the data, and that therefore, at worst, the Secretary made the decision to add the question in spite of the negative effect, not because of it. Defs.' Br. at 26. However, *Feeney* simply stands for the proposition that impact alone, without more, cannot support a finding of intentional discrimination. In this case, in addition to the evidence of impact, the district court found, *inter alia*, that the entirety of the record showed that "the VRA rationale was a pretext, and the statements in the Ross Memo contradict the unanimous opinion of the Census Bureau" regarding the certain disparate impact of a quite unnecessary change to the Census. JA 2851. The "policy judgment" manifested no sensible judgment at all where Defendants have failed to provide a truthful reason, much less a compelling one, for the addition of the citizenship question.

II. The Court's Findings Confirm that the Arlington Heights Historical Background Factor Weighs in Favor of Finding That the Decision was Motivated by Racial Discrimination

Arlington Heights instructs the court to examine the "historical background of the decision," which may include a history of discrimination by the jurisdiction. 429 U.S. at 267; *NAACP*, 831 F.3d at 223. The Court in *NAACP* did both. When it looked at the long history of racial discrimination in North Carolina, it contextualized the historical background to the circumstances at hand. *See*

NAACP, 831 F.3d at 225–26. Defendants' reliance on the purported long record of "[q]uestions about birthplace and citizenship . . . on the census for most of the country's 200-year history," Defs.' Br. at 34, fails to present history in the full and proper context.

With the 1976 amendments to the Census Act, Congress encouraged the use of sampling and other means of data collection where possible, instead of the decennial Census. *See* S. Rep. No. 94–1256, at 4 (1976).[4] Specifically, the 1976 amendments required the Secretary to use administrative records instead of Census questions to collect demographic data "[t]o the maximum extent possible." 90 Stat. at 2460 (13 U.S.C. § 6(c)); *see also* JA 2924. The "Census Bureau is a principal statistical agency within the federal statistical system . . subject to the standards and directives of the Office of Management and Budget (OMB)" that regulate the methodologies, practices, and data quality of the Census. *See* JA 2925–26. Any analysis of the citizenship question's historical background, then, as in *NAACP*, is to be viewed "contextually" within the confines of these requirements.

[4] *See also* Pub. L. No. 94-521, sec. 7, § 141(d), 90 Stat. 2459, 2461-62 (codified as amended at 13 U.S.C. § 141(d) (1976)) (authorizing mid-decade Census); Pub. L. No. 94-521, sec. 10, § 195, 90 Stat. 2459, 2464 (codified as amended at 13 U.S.C. § 195 (1976)). The Secretary is to use the decennial Census to collect "other" information besides a "census of population," only "as necessary." Pub. L. No. 94-521, sec. 7, § 141(a), 90 Stat. 2459, 2461 (codified as amended at 13 U.S.C. § 141(a) (1976)); *see also* JA 2924.

Importantly, the modern Census has not asked the citizenship question of every household since 1950 when the Census questionnaire was conducted by in-person enumerators going door-to-door.[5] JA 675; JA 1470. And, it is no surprise that in this context, the Census Bureau and the Department of Commerce have opposed the collection of citizenship data in previous modern censuses. *See, e.g.*, *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980).[6]

Adding the untested citizenship question at the eleventh hour, knowing that it would compromise data accuracy, knowing that it would reduce self-response by Latinos and noncitizens, knowing that it was consistently opposed by Census Bureau experts, and justified only by a fabricated rationale, is the very definition of "unusual," and is plainly "suggestive of discriminatory motive." *See* Defs.' Br. at 29.

Finally, *NAACP* began its historical survey with laws upholding slavery prior to the Civil War, subsequent Jim Crow laws, and laws disenfranchising Black

[5] As the district court found, the modern Census "short form" questionnaire that goes to all households asks only a handful of questions compared to the ACS and its predecessor "long form" questionnaire, which is sent only to a sample of households. JA 2849–50.

[6] In opposing the collection of citizenship data in the 1980 Census, the Census Bureau and Commerce believed "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count . . . . Questions as to citizenship are particularly sensitive in minority communities[.]" *Id.*

voters. *NAAPC*, 831 F.3d at 223. It is similarly worth noting that the history of the Census and apportionment in this country began in Article 1, Section 2 of the Constitution with the three-fifths compromise that counted only three of every five African-American enslaved persons for purposes of apportionment.[7] The administration's goal here is a zero-fifths rule for noncitizens in apportionment and redistricting, and a commensurate deprivation of political representation for the Latino communities in which noncitizens chiefly reside.

III. Defendants Departed from the Well-Established Process for Adding a Question to the Census in Order to Rush the Addition of the Question, Knowing It Would Harm Latinos and Noncitizens

Defendants do not refute that they failed to follow the "well-established process" for the addition of a question to the Census. Rather, by arguing that the individual components of the process leading up to the March 26 memorandum do not reveal discriminatory animus, Defendants incorrectly examine "each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*." *NAACP*, 831 F.3d at 233.

First, Defendants argue that there is nothing unusual about a Secretary communicating with other government officials and outside stakeholders during the consideration of a policy matter. Defs.' Br. at 31. However, an examination of the sequence and content of these communications shows that the process of

[7] The three-fifths clause was superseded by Section 2 of the 14th Amendment.

adding the citizenship question was anything but usual, and that it was inextricably tied to whether noncitizens were to be included in apportionment and redistricting. The district court's findings recite the uncontested facts regarding the multiple communications between Commerce officials, the White House officials, DOJ, and Kris Kobach concerning the citizenship question and apportionment and redistricting.[8] JA 2851–60. Defendants' attempts to sanitize those communications is unavailing. They reveal, on their face, that the motive had nothing to do with Voting Rights enforcement and everything to do with skewed political representation.

The illegitimacy of the Secretary's proffered rationale is, under the mountain of findings confirming its history and pretext, more than well-established. Defendants nonetheless assert that the district court's finding of pretext is immaterial. Defs.' Br. at 46. Again, Defendants ignore the *Arlington Heights*

[8] Defendants rely on *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 822–23 (4th Cir. 1995), to argue that Kobach's motives cannot be attributed to Secretary Ross. However, this reliance is misplaced. In *Sylvia*, this Court addressed the denial of a zoning designation to a foreign company with a foreign-born president. 48 F.3d at 815. The Court found that a question and comment from a single audience member at a public hearing regarding the national origin of the developer, which the commissioner dismissed as having "no bearing" on the hearing, should not be attributed to the commissioner. *Id.* at 822–24. Thus, *Sylvia* is easily distinguishable from this case, as the sequence of events leading up to the Ross Memo reveal numerous communications and statements by administration officials and others that indicate discriminatory motive. Moreover, in *Sylvia*, unlike the district court in this case, the court found that the board had a rational basis for denial—to avoid an adverse impact on traffic safety and water supply. *Id.* at 825.

analysis, which instructs the court to consider, among the totality of the circumstances, that the Secretary manipulated, prevaricated, misled Congress, enlisted the DOJ in the ruse, and filled his decision letter with baseless recitations of the process in which he claims to have engaged. *See NAACP*, 831 F.3d at 233.

Defendants' citation to a Title VII case decided under the burden-shifting *McDonnel Douglas* framework is nothing more than deliberate misdirection from the standards articulated in *Arlington Heights* and *NAACP*. Defs.' Br. at 44 (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515–16 (1993)). The relevance of the falsity of the rationale in an *Arlington Heights* analysis is two-fold. First, pretext is part of the historical background of the decision and is probative of procedural and substantive irregularities. *See Arlington Heights*, 429 U.S. at 267. Second, when the *Arlington Heights* analysis leads to the conclusion that race was one of the motivating factors, the burden shifts to Defendants to demonstrate that Secretary Ross would have added the question for some other legitimate non-discriminatory reason. *NAACP*, 831 F.3d at 221 (citing *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)); *Arlington Heights*, 429 U.S. at 271 n.21. In this case, there is no other reason—the "only reason provided" was pretextual. JA 2951–54.[9] As

[9] Defendants identify only one other piece of evidence in the Administrative Record purportedly supporting the need for a citizenship question: a handful of conclusory letters from States asserting "that citizenship data from the census would be useful for their own VRA and redistricting efforts." Defs.' Br. at 33. If the Secretary relied on these letters, they only further uphold a finding of pretext:

recently as June 18, 2019, when pressed by the district court to point to any evidence in the record for the decision, "other than the VRA pretext," defense counsel responded that "[t]he rationale that the Government believes is reflected in the record is that which is in the March memo from the Secretary[.]" Hulett Dec., Ex. A, Transcript of June 18, 2019 Oral Argument, *Kravitz v. Dep't of Justice*, No. 8:18-cv-01041-GJH at 87:25–88:8.

Next, Defendants further misapply the *Arlington Heights* analysis in their contention that discrimination did not motivate the Secretary's decision to reject the Census Bureau's recommendation to use administrative data ("Alternative C") over an alternative that combined the use of administrative data and the citizenship question ("Alternative D").[10] Defs.' Br. at 33–35. The Secretary's rejection of the Census Bureau's unanimous warnings inevitably shows his relentless pursuit of the plan in the face of scientifically based projections—one of the circumstances contributing to the totality under *Arlington Heights*.

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in one of those letters, thirteen state attorneys general described a citizenship question as the "solution" to the alleged problem that "legally eligible voters may have their voices diluted or distorted" by "non-citizens." JA 3477–79.

[10] The district court described the alternatives as follows: "Alternative D refers to the fourth alternative analyzed by the Census Bureau and devised by Secretary Ross, which 'combined Alternative B (asking the citizenship question of every household on the 2020 Census) with Alternative C (do not ask the question, link reliable administrative data on citizenship status instead).'" JA 2944 n.23.

Defendants argue that the Secretary had good reason to disagree with the Census Bureau's recommendation because of his purported (pretextual) need for hard data rather than data obtained from administrative records. Defs.' Br. at 41–42. However, the district court found that "any superficial gain" from obtaining any additional citizenship data through the question "would come *at the expense* of accuracy[.]" JA 2946; *see also* JA 2862–63, 2868–69, 2921–22.[11] The decision to persist with the addition of a citizenship question in the face of overwhelming evidence of the harm it would cause is yet another piece of the motivation puzzle.

Defendants next contend that Secretary Ross did not mislead Congress by concealing the true rationale for the addition of the citizenship question. Defs.' Br. at 35. Secretary Ross stated in the March 26 memorandum that "*following* receipt of the DOJ request, I set out to take a hard look at the request . . . so that I could make an informed decision on how to respond." JA 3519 (emphasis added). However, the decision had been made months prior in concert with other Administration members and advisors. JA 2853, 2856–59. By omitting that the decision to add the question preceded the DOJ request, Secretary Ross concealed

[11] Defendants also state that the Census Bureau was unsure of the relative advantages of its "preferred approach" because it could not "quantify the relative magnitude of the errors across the alternatives" at the time. Defs.' Br. at 33–34. Defendants ignore the fact that regardless of the magnitude, the "Census Bureau's experts unanimously favored Alternative C over Alternative D," JA 2946 n.24, because, as Dr. John Abowd agreed during his deposition testimony, "Alternative D produces worse data quality," JA 726–33.

the real rationale.[12] In fact, had Secretary Ross not concealed the real rationale, there would have been no need for him to issue a "supplemental memorandum"—stating that he began considering the citizenship question soon after his appointment as secretary and consulted other agencies—on June 21, 2018, JA 3186, *after* lawsuits challenging the citizenship question had been filed and Administrative Record documents revealed the true sequence of events. The supplemental memorandum further failed to provide any alternative rationale for the addition of the question other than the pretextual VRA enforcement rationale. *Id.*

Finally, Defendants contend that the Secretary's decision did not break from past practice. Defs.' Br. at 36. Yet, the district court found that Secretary Ross, "on his path to adding a citizenship question . . . bulldozed over the Census Bureau's standards and procedures for adding questions, at times entirely ignoring the Bureau's rules." ECF No. 43-1, Ex. A at 10–11 (district court's memorandum

[12] Indeed, multiple fact-finders have found that Secretary Ross misled Congress. *See* JA 2874–75 (Secretary Ross "concealed" the fact that he "decided in the Spring of 2017, months before receiving DOJ's request, that he wanted to add a citizenship question to the 2020 Census . . . . when he represented to Congress that the Department of Commerce analysis around the citizenship question was 'solely' in response 'to the Department of Justice's request,' and not at the direction of President Trump or anyone at the White House . . . and that DOJ 'initiated the request for the inclusion of the citizenship question' to the 2020 Census[.]"); *New York v. Dep't Commerce*, 351 F. Supp. 3d 502, 547 (S.D.N.Y. 2019) (the Secretary's "first version of events, set forth in the initial Administrative Record, the Ross Memo, and his congressional testimony, was materially inaccurate").

opinion explaining order granting Plaintiffs' motion for an indicative ruling under Rule 62.1(A)) (*citing* JA 2943–51).

With regard to past practices, Defendants first claim that the decision to add a citizenship question itself was merely a "return to the traditional practice" because of the history of questions about citizenship or place of birth on past Census forms. Defs.' Br. at 36–37. However, as discussed above, a citizenship question has not been asked of every household on the decennial Census in the last 70 years. *See supra* Sec. B.

Defendants next rely on Justice Gorsuch's opinion regarding *discovery* to argue that Secretary Ross' solicitation of a request for the citizenship question from other agencies was not evidence of discriminatory motive because there is nothing unusual about a new secretary favoring a particular policy and soliciting support from other agencies to bolster his view. Defs.' Br. at 37 (quoting *In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2018) (Gorsuch, J.)).[13] No matter how commonplace racial animus and prevarication has become in our political discourse, the Constitution remains a guard against their manifestation by public officials who make official decisions that affect the lives of those who are targeted.

[13] Justice Gorsuch wrote to concur in part and dissent in part on the Supreme Court's response to an application for stay (of a New York district court order compelling the deposition of Secretary Ross) presented to Justice Ginsburg and referred by her to the Court. *See In re Dep't of Commerce*, 139 S. Ct. at 17 (Gorsuch, J.).

It is indeed "unusual" for a cabinet member to manipulate laws and disregard the best available advice in order to serve a discriminatory end. It must be considered unusual for two cabinet members to conspire to manufacture facially neutral justifications to serve those ends, to lie to Congress about the true motivations that preceded, by months, the one offered to Congress and to the courts. It is not simple red tape-cutting for an agency to be forced to abandon all safeguards to ensure the accuracy of a constitutionally required Census of the population that will affect political representation and basic federal funding for the next decade.

IV. Discriminatory Statements Made by Administration Officials and Others Are Probative of Defendants' Discriminatory Intent

The district court erred in its review of the contemporaneous statements by those surrounding Secretary Ross, including high-ranking White House and administration staff. Plaintiffs are not required to provide direct admissions of racial animus by Secretary Ross in order for this Court to hold that the district court committed error when it failed to consider, as part of the totality of circumstances, its own factual findings regarding the motives of all the individuals who played a role in the addition of the question.

Defendants incorrectly argue that the only person who was interested in the citizenship question as a vehicle for affecting apportionment was Kobach, and that senior Commerce officials rejected his views. Defs.' Br. at 40. The record, however, reflects otherwise. There were a number of people communicating with

Secretary Ross who "had an interest in whether undocumented immigrants are counted in the Census for apportionment purposes, and that the Secretary did look at that issue." JA 2883–84; *see also* 2865–66, 2875–76. Indeed, exclusion of noncitizens from reapportionment is the most obvious motive found in internal Commerce communications and in communications with Kris Kobach. *See, e.g.*, JA 2851–52, 2854–55, 2865–66.[14]

Defendants are dismissive of the court's findings regarding racial animus of persons in Secretary Ross' orbit and the other evidence suggesting that the President had a hand in directing his Secretary on this question, again by misapprehending the exercise of reviewing contemporaneous statements and instead requiring direct evidence of the transfer of those motives to the Secretary in the context of the decisions he made. Neither *Arlington Heights* nor *NAACP* requires any such thing. Indeed, this Court in *NAACP* took care to dispel any suggestion that its conclusion meant that individual legislators harbored racial animosity, but nonetheless held that the totality of the circumstances revealed that

[14] Perhaps one of the most telling email exchanges is one in which the Commerce General Counsel tells the Secretary's assistant that his ideas include a useful "hook," to argue that Commerce will not be responsible if Congress, or the President, use the data for apportionment. JA 2897–88. The district court also noted evidence in the record that "show President Trump is concerned by the political power that undocumented immigrants may wield." JA 2884.

the legislators targeted Black voters who were unlikely to vote for them. 831 F.3d at 233.[15]

Defendants argue that the cat's paw theory of liability, under which Secretary Ross acted because of pressure from the administration, is not applicable to a cabinet secretary because it would limit the secretary's ability to carry out his duties. Defs.' Br. at 40–41 (citing *Staub v. Proctor Hospital*, 562 U.S. 411 (2011)). However, where the government action is taken for a discriminatory reason in violation of the U.S. Constitution, then liability cannot simply be laundered away with a pretextual justification that the Secretary manufactured. To hold otherwise would allow under-officials to escape judicial review for carrying out discriminatory, unlawful, and unconstitutional commands of the President.[16]

[15] In *NAACP*, the Fourth Circuit even considered the racist pre- and post-decisional public statements of Republican precinct chairman as "some evidence of the racial and partisan political environment in which the General Assembly enacted the law." 831 F.3d at 229 n.7.

[16] Defendants argue that the email from the President's re-election campaign, claiming Presidential credit for the addition of the citizenship question, should have been excluded as inadmissible hearsay. Defs.' Br. at 42. The Secretary acknowledged that he reviewed the email prior to his testimony before Congress, where he falsely testified that the DOJ "initiated" the process to add the citizenship question. *See* Pltfs.' Br. at 7–8; JA 2875, JA 3611, JA 5103, JA 5052 (video testimony). The email is not hearsay because it is not offered for the truth of the matter asserted. JA 4400. Rather, the email demonstrates the President's then-existing motive for adding the citizenship question and its transmission to the Secretary by his staff.

V. New Evidence Is Relevant With Respect to Defendants' True Motivation to Add the Citizenship

As noted in Plaintiffs' notice and motion to the Court, the district court granted Plaintiffs' Rule 62.1 motion, finding that the evidence is "new," admissible, and raises a substantial issue, *see* ECF No. 43-2 at 12–13 (district court opinion). Plaintiffs note that the newly discovered evidence is consistent with their allegations of discriminatory animus. The trial record and the Hofeller documents both reveal that the central purpose of adding a citizenship question was to deprive Hispanics and noncitizens of political representation. *See, e.g.*, JA at 2851–60, 2865–66 (documents showing Kobach had the same desire to deprive noncitizens of equal representation and later adopted the Hofeller/Neuman VRA rationale). That the citizenship question could enable this outcome by excluding certain populations from the Census count *and* by excluding them from redistricting does nothing to refute Plaintiffs' claim. To the contrary, it explains precisely why the Secretary pressed ahead with adding the citizenship question in the face of unequivocal and uncontradicted evidence that it would cause a disproportionate undercount of noncitizens and Latinos—because, as the district court found, this would result in the loss of political representation in areas with high Latino and noncitizen populations. JA 2860–70, JA 2929–31, JA 2947, JA 2955.

Defendants argue that the 2015 Hofeller study merely provides an "empirical observation on the impact of a switch to the use of citizen voting age

population ("CVAP") for redistricting," Defs.' Br. at 50. However, his study suggests that switching to the use of CVAP data for redistricting would benefit Republicans and non-Hispanic whites, *to the detriment* of Latinos, and that the way to achieve this goal was to add a citizenship question to the Census. This is not merely an empirical observation; this is evidence of the racial animus that ultimately led to the addition of the citizenship question. It may be that it is constitutional for states to make a decision about what population base to use so long as the decision is not based on discriminatory animus. But seeking to create a database in order to exclude noncitizens because they are primarily Latino and Democrat, and then moving forward with this decision because it will further a partisan goal by depressing the response rates of this population *is* discriminatory. *See NAACP*, 831 F.3d at 233.

CONCLUSION

For the foregoing reasons, the district court's denial of Plaintiffs' equal protection claim should be reversed.

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In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, the undersigned counsel for appellees certifies that the accompanying brief is printed in 14-point Times New Roman typeface, with serifs, and, including footnotes, contains no more than 6,500 words. According to the word-processing system used to prepare the brief, Microsoft Word, it contains 5,664 words.

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2019, the foregoing Plaintiffs-Appellees' Reply Brief was served on all parties or their counsel of record through the CM/ECF system if they are registered users.

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